No. 12441

United States
COURT OF APPEALS
for the Ninth Circuit

HUGO V. LOEWI, INC., a Corporation,

Appellant,

v.

KILIAN W. SMITH,

Appellee.

BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

KERR & HILL,
ROBERT M. KERR,
STUART W. HILL,
Equitable Building,
Portland, Oregon,
Attorneys for Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND 5-50

SUBJECT INDEX

Page

TABLE OF CASES

UNITED STATES CODE

OTHER STATUTES
IN
OREGON COMPILED LAWS ANNOTATED

RULES OF FEDERAL PROCEDURE

TEXTBOOKS

No. 12441

United States
COURT OF APPEALS
for the Ninth Circuit

HUGO V. LOEWI, INC., a Corporation,

Appellant,

v.

KILIAN W. SMITH,

Appellee.

BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

JURISDICTION

This cause was commenced on March 16, 1948, in the Circuit Court of the State of Oregon for the County of Marion, to recover the purchase price of a quantity of hops, the amount for which judgment was demanded being $15,351.38, exclusive of interest and costs (Tr. 2, 9, 28).

Within ten days thereafter, on March 26, 1948, a petition for removal of this cause was filed in said Cir-

cuit Court and an order of removal was entered by the judge of the Circuit Court (Tr. 34, 35), that being within the time allowed by Title 28, U.S.C.A., Section 72, inasmuch as that was at the time or before the defendant was required by Sections 1-602 and 1-801, Oregon Compiled Laws Annotated, to answer or plead to the complaint of the plaintiff. Thereafter, on April 23, 1948, the defendant entered in the District Court of the United States for the District of Oregon, a certified copy of the record in such suit commenced in such Circuit Court (Tr. 36).

This cause was removed to the District Court for the District of Oregon, by the defendant, a nonresident of Oregon, pursuant to Title 28, U.S.C.A., Section 71, this being a suit of a civil nature at law of which the District Courts of the United States were given jurisdiction (Tr. 2, 30, 34). The District Court for the District of Oregon had jurisdiction of this cause by reason of Title 28, U.S.C.A., Section 41(1), this being a suit of a civil nature at law where the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000, and is between citizens of different states, the defendant being a citizen of New York and the plaintiff of Oregon (Tr. 2, 30, 34). Upon the repeal of that section, the District Court had jurisdiction by reason of Title 28, U.S.C.A., Section 1332.

A final judgment was entered in this cause by the District Court, in favor of the plaintiff, on Sept. 30, 1949, for $15,343.78, together with interest and costs (Tr. 56, 57).

This appeal was taken pursuant to Title 28, U.S. C.A., Section 1291. The notice of appeal from such judgment was filed on October 10, 1949 (Tr. 57).

STATEMENT OF CASE

This is an appeal by the defendant from a judgment for the plaintiff in an action for the contract price of hops produced by the plaintiff in the year 1947 and contracted to be sold to the defendant. Two separate written contracts are involved, one relating to fuggle variety hops, and the other to cluster variety hops. The fuggle hops were accepted by the defendant, but the cluster hops were rejected by the defendant as not of the grade, quality and condition required by the contract.

The defendant moved for a dismissal of the cause of action relative to the cluster hops on the ground it fails to state a claim against the defendant upon which relief can be granted (Tr. 36, 39), but the court reserved decision thereon (Tr. 39). The same issue is raised by the defendant's amended answer (Tr. 40).

The defendant counterclaimed for $3,000.00 which it advanced to the plaintiff pursuant to the contract on the cluster hops as a loan to cover harvesting and processing costs (Tr. 42).

This action was tried by the court without a jury. The court issued a Memorandum of Decision (Tr. 46), signed (with one change) Findings of Fact and Conclusions of Law prepared by the plaintiff's counsel (Tr. 47-56), and entered judgment (Tr. 56, 57) for the plain-

tiff for the sum of $8,846.52 (the total contract price of the cluster hops less the advance of $3,000.00 paid by the defendant to the plaintiff on those hops), and for the further sum of $6,497.26 (the contract price of the fuggle hops less an advance payment of $3,500.00 by the defendant to the plaintiff on those hops), and also for interest on both sums from October 31, 1947, and costs.

This is one of three cases involving contracts for the sale of hops which were tried before the same judge under stipulation and order that the testimony in each case shall apply to each other case insofar as material (Geschwill Tr. 504). The other cases are Hugo V. Loewi, Inc., Appellant, v. Fred Geschwill, Appellee, No. 12440 (hereinafter referred to as the "Geschwill case"), and John I. Haas, Inc., Appellant, v. O. L. Wellman, Appellee, No. 12442. Each of these cases is now on appeal to this Court and the records of all are consolidated for the purpose of each appeal (Tr. 357).

This court has now entered an order in the consolidated appeal of this case and the two cases just mentioned, by which counsel for the appellant and the appellee in the briefs filed by them in this case and in the Wellman case, may adopt by reference such portions of the briefs filed by them in the Geschwill case as are required in the briefs in the other two cases.

The issues in this case relate only to the cluster hops, to that part of the trial court's judgment which grants recovery under the cluster hops contract, and to the defendant's counterclaim for $3,000.00 advances made on

the cluster hops. That portion of the judgment, amounting to $6,497.26, which covers the plaintiff's claim on the fuggle hops, is not in question. The defendant's amended answer includes a continuing tender to the plaintiff of that sum (Tr. 44). The defendant thus acknowledges a liability to the plaintiff for $3,497.26, which is the net amount of the plaintiff's claim on the fuggle hops less the $3,000.00 advanced by the defendant to the plaintiff on the cluster hops.

The ultimate issues in this case are the same as in the Geschwill case: (1) whether or not the cluster hops tendered by the plaintiff and rejected by the defendant were of the grade, quality and condition required by the contract, and (2) if the hops did conform to the contract requirements, so that the defendant's rejection was a breach of contract, whether the plaintiff's measure of recovery is the contract price, or is limited by contract and statute to the difference between the contract price and the market value of the hops.

The cluster contract (Tr. 11) specifies that the hops shall be

> "not affected by spraying or mold, but shall be of prime quality, in sound condition, of good color, fully matured, cleanly picked, free from damage by vermin, properly dried, cured and baled, and in good order and condition."

The measure of damages for any breach of the contract is fixed as follows (Tr. 15):

> "* * * upon the breach of the terms of this contract by either party, the difference between the contract price of said hops and the market value

> thereof at the time and place of delivery shall be considered and is hereby agreed to be the measure of damages, which may be recovered by the said party not in default for such breach, and the said difference between the said contract price and the market value thereof is hereby agreed and fixed and determined as liquidated damages."

The contract was negotiated with the plaintiff by Lamont Fry, an employee of C. W. Paulus of Salem, Oregon, a commission broker or buyer of hops for the defendant and other hop dealers (Tr. 104-108, 195-198, 208-213) (Geschwill Tr. 322; Geschwill Exhibit 51, Tr. 290). The contract was executed in Oregon on August 19, 1947 (Tr. 109, 230; Exhibit 1, Tr. 88). Its general provisions are the same as those of the contract involved in the Geschwill case; it differs from the Geschwill contract only with respect to the identity and quantity of hops covered, the rate and amount of advances to be paid by the defendant, and the contract price provisions. It is a contract to sell "future goods" in that it provides for the sale and delivery in processed and baled state of hops which were growing on the vines when the contract was executed. Harvest of the hops began about August 25 (Tr. 102).

The defendant's rejection of the cluster hops was by reason of damage resulting from downy mildew which attacked the hops prior to harvest (Tr. 291, 292, 314; Exhibits 28, 29, Tr. 88, 91).

The plaintiff's estimates of his crop before harvest are significant. He told Mr. Fry prior to execution of the contract that he had "some" mildew (Tr. 147), and

he and Mr. Fry together walked through the cluster yard. At that time there was a very heavy set of hops on the vines (Tr. 139, 197), which the plaintiff estimated at 100 bales, including the hops affected by mildew (Tr. 139). He thought that possibly 50 per cent of the hops had been hit by the mildew (Tr. 103, 151). Mr. Fry noted substantial quantities of hops which were not affected by mildew and estimated that the production of mildew-free hops would amount to 50 bales (Tr. 138, 196, 197). At the plaintiff's suggestion 10,000 pounds (50 bales) were specified in the contract as the estimated contract quantity (Tr. 140; Exhibit 1, Tr. 88).

The plaintiff actually harvested, baled and tendered to the defendant 73 bales of cluster hops, or 23 bales in excess of the pre-harvest estimate of his mildew-free production (Tr. 103).

During the consideration of the possible size of the crop, the plaintiff and Mr. Fry also discussed the method to be followed in picking the hops so as to avoid harvesting the mildew-damaged hops. Mr. Fry testified and the plaintiff did not deny that it was understood that the plaintiff would not pick any mildewed hops (Tr. 198).

An advance payment or loan of $3,000.00 was delivered by Mr. Fry to the plaintiff on August 27, 1947 (Exhibit 8, Tr. 88, 89), in response to the plaintiff's request for the production advance provided for by the contract (Tr. 110, 111). The $3,000.00 was provided, instead of $2,500.00 specified in the contract, in response to the plaintiff's representation that he needed the larger

amount because of increased pickers' wages (Tr. 111, 113, 215). This loan on the cluster hops was not repaid by the plaintiff, but was deducted by the defendant from the sum payable to the plaintiff for the fuggle hops at the time the defendant tendered payment for those hops (Exhibit 33-C, Tr. 88, 91).

The plaintiff admittedly made no earnest effort to avoid harvesting mildewed hops. He acknowledged that he harvested and baled all but 25 per cent of the cluster crop (Tr. 133) despite the fact that 50 per cent of the crop was mildewed (Tr. 103). He did not cut down any of the vines of mildewed hops ahead of the pickers in order to avoid the harvesting of those hops (Tr. 134, 135). He simply told his pickers "to let the worst ones hang," with the result that the pickers did pick mildewed hops, and "just skipped those that were real badly infected" (Tr. 134).

After the cluster hops had been baled and warehoused by the plaintiff, "type" samples were taken by Mr. Fry and forwarded to the defendant in New York (Tr. 232, 233). These samples are in evidence as Exhibits 54-A to 54-G (Tr. 88, 94). Upon receipt of the first of these samples, the defendant advised Mr. Paulus that the hops were blighted and of a quality which it could not deliver to its customers, and that it would not accept hops such as that sample (Exhibits 16, 17, Tr. 88, 90; Tr. 249, 315). The defendant further instructed Mr. Paulus either to demand the refund of all advances made to the plaintiff or to apply the advance which was made on the cluster hops against the amount due on

the fuggle hops which had been accepted (Exhibit 21, Tr. 88, 90).

Upon receipt of five additional type samples, the defendant informed Mr. Paulus that the samples were very poor quality, were badly blighted (meaning damaged by mildew), and could not be accepted as a prime delivery, and suggested that 10th bale samples be supplied for the defendant's final decision (Exhibits 22, 23, 24, Tr. 88, 90; Exhibit 27, Tr. 88, 91; Exhibit 46, Tr. 88, 93; Tr. 262, 318).

Mr. Paulus accordingly arranged with the plaintiff to obtain the 10th bale samples, and the plaintiff agreed in writing that the inspection and grading of the hops in the warehouse, the taking of such samples, the numbering of the bales, and the weighing of each bale, would not be considered an acceptance of the hops (Exhibit 5, Tr. 88, 89). A "trying" of each bale and a large sample of each 10th bale were then taken in the usual manner by Mr. Fry on October 3, 1947. These 10th bale samples are in evidence as Exhibits 52-A to 52-E, and 53-A to 53-G (Tr. 88, 93), and 57-A to 57-E (Tr. 88, 94, 275). Mr. Fry at that time informed the plaintiff that the hops were then neither accepted nor rejected but that they must await word from the defendant in the east (Tr. 122, 123, 127, 128).

Upon examination of the 10th bale samples, the defendant advised Mr. Paulus that these samples were blighted, off grade, and not a prime delivery and directed that the cluster hops be rejected and refund of advances obtained (Exhibits 28, 29, Tr. 88, 91). Mr.

Paulus immediately notified the plaintiff that the cluster hops did not meet the requirements of the contract as to grade, quality, character and condition and therefore could not be accepted, and requested payment of the $3,000.00 which had been advanced to the plaintiff on those hops (Exhibit 3, Tr. 88).

The defendant on September 25, 1947 offered to buy a part of the plaintiff's fuggle hops which had been purchased but released by another dealer, to replace the unsatisfactory 73 bales of clusters. The defendant offered 91¢ per pound for these fuggle hops, as compared with the 84¢ per pound contract price of the cluster hops. This offer was kept open to October 1, 1947, but was rejected by the plaintiff (Tr. 231, 241, 242; Exhibit 45, Tr. 88, 93; Exhibit 34, Tr. 88, 91; Exhibit 44, Tr. 88, 93).

The plaintiff did not contend at the trial that the cluster hops tendered to the defendant were not affected by mildew. He asserted that "prime" quality as applied to hops, means "average of the crop for the crop year," or "merchantable," and that his 1947 crop clusters were of merchantable quality, and were better than average in lupulin content (Tr. 130). On cross-examination, however, he acknowledged that hops badly damaged by mildew are not of prime quality (Tr. 171, 172). He further acknowledged that in order to be of prime quality the hops should be fully matured and of good color (Tr. 165).

The plaintiff's witness, H. A. Cornoyer, a hop dealer and broker of more than 40 years' experience in the

Willamette Valley, testified that although the samples of the plaintiff's cluster hops were average for the year 1947 (Tr. 182), they all showed mildew which was readily apparent upon looking at the hops, were not of good color, and were not prime quality hops as that term is generally applied in the trade (Tr. 181, 185, 186). He further testified that the samples would be regarded as merchantable hops (Tr. 181) but that the mere fact that hops are merchantable does not necessarily mean that they are prime hops (Tr. 184).

Other witnesses for the plaintiff likewise testified that there was mildew in the plaintiff's cluster hop samples, and compared those samples with such samples of 1947 crop hops of other growers as they had seen (Tr. 189, 190, 334, 335).

The defendant's witnesses testified concerning the plaintiff's cluster hops in terms of the express provision of the cluster contract requiring delivery of hops not affected by mold, but of prime quality, in sound condition, of good color, fully matured, and in good order and condition.

Mr. Hoerner, Plant Bacteriologist of Oregon State College and the United States Department of Agriculture, specializing in a study of downy mildew in hops, testified that the sample of the plaintiff's cluster hops analyzed by him contained more than 83 per cent by weight of mildew-infected hops (Tr. 268). Such mildew is a type of mold which discolors the hops and may result in dead, brown immature burrs known as nubbins (Geschwill Tr. 366, 370).

Mr. Ray, a hop grower and dealer of more than 50 years' experience (Geschwill Tr. 391) examined all of the plaintiff's cluster samples, including those put in evidence by the plaintiff, and found them to contain obvious heavy mildew damage. He stated that none of the samples was of prime quality (Tr. 279, 280, 283, 284).

Mr. Eismann, a hop grower and dealer of 20 years' experience, also examined the Geschwill samples in court and testified that beyond any doubt none of them was of good color, each of them contained hops not fully matured, and that none of the samples was of prime quality (Tr. 285, 289).

Throughout the period from the selection by the plaintiff of the September 16th market price as the contract price for the cluster hops (Exhibit 6, Tr. 88, 89), to long after the rejection of the hops by the defendant, the market price for hops of the grade, quality and condition described in the contract remained at or above that contract price (Tr. 292) (Geschwill Tr. 361-363, 416, 419; Geschwill Exhibit 33, Tr. 285).

Settlement of the account covering the fuggle hops which were under contract to and accepted by the defendant, was offered to the plaintiff following rejection of the cluster hops. On October 25, 1947 a check for $3,497.26 was delivered on behalf of Mr. Paulus to the plaintiff, bearing the notation "balance on contract delivery 59 bales fuggles" (Exhibit 9, Tr. 88, 89). This sum represented the full purchase price of the fuggle hops accepted by the defendant, less the $3,500.00 paid

to the plaintiff as an advance under the fuggle contract, and less also the $3,000.00 paid to the plaintiff as an advance under the cluster contract (Exhibit 33-C, Tr. 88, 91; Tr. 126). The plaintiff accepted but did not cash this check (Tr. 126, 127), and the same was returned to Mr. Paulus by the plaintiff's attorneys with their letter dated November 19, 1947 (Exhibit 10, Tr. 88, 89).

The plaintiff did not resell the 73 bales of cluster hops rejected by the defendant (Tr. 129).

SPECIFICATION OF ERRORS

The District Court erred:

1. In finding that by the agreement of August 19, 1947, the plaintiff contracted to sell and the defendant contracted to buy the entire crop of cluster hops grown by the plaintiff in 1947 on his farm, and in basing the judgment thereon (Tr. 48). Such finding is clearly erroneous and is unsupported by substantial evidence, as the agreement itself provides that the defendant was required to accept and pay for only those hops which met the standards of quality and condition specified in the agreement (Tr. 12).

2. In finding that pursuant to said contract the plaintiff duly harvested, cured, and baled said cluster hops grown thereon in said year in a careful and husbandlike manner, and in basing the judgment thereon (Tr. 49). Such finding is clearly erroneous and is unsupported by substantial evidence, as the plaintiff acknowledged that he harvested and baled hops which he

knew to be damaged by mildew (Tr. 119, 120, 130, 134). Furthermore, this finding is wholly irrelevant and immaterial.

3. In finding that the defendant knew that said crop of cluster hops would in normal course show such mildew when picked and baled, and in basing the judgment thereon (Tr. 50). Such finding is clearly erroneous and is unsupported by substantial evidence. Furthermore, this finding is wholly irrelevant and immaterial as the plaintiff assumed the risk of mildew damage in his baled hops.

4. In finding that the plaintiff did everything he was bound to do for the purpose of putting the specific crop of cluster hops in a deliverable state, and in basing the judgment thereon (Tr. 51). Such finding is clearly erroneous and is unsupported by substantial evidence, as the plaintiff acknowledged that he harvested and baled hops which he knew to be damaged by mildew (Tr. 119, 120, 130, 134)). Furthermore, this finding is wholly irrelevant and immaterial.

5. In finding that the plaintiff, with the assent of the defendant, delivered his baled cluster hops to the warehouse and set them aside for the defendant, and appropriated them to the contract, and in basing the judgment thereon (Tr. 51). Such finding is clearly erroneous and is unsupported by substantial evidence, as there is no evidence that the defendant expressed any assent whatever, that is, expressed irrevocably a willingness to take as its own the hops appropriated by the plaintiff. The only evidence on this point is that the

defendant, by rejecting the hops, expressed a decided unwillingness to take them as its own (Exhibit 3, Tr. 88).

6. In finding that the plaintiff duly performed all of the terms and conditions of the contract relating to such cluster hops, which he was required to perform, and in basing the judgment thereon (Tr. 51). Such finding is clearly erroneous and is unsupported by substantial evidence, if the contract is construed in the manner advocated by the defendant, as the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 119, 120, 180, 181, 268, 269, 277-280, 286-288, 301-307).

7. In finding that by the term "blighted" it was meant that the said cluster hops showed some mildew effect, and in basing the judgment thereon (Tr. 53), if that finding is construed to mean that these hops were rejected because of a slight degree of mildew infestation. Such finding is clearly erroneous and is unsupported by substantial evidence, as the undisputed evidence establishes that the defendant rejected the plaintiff's hops because of substantial damage by mildew (Tr. 291, 292, 301-307).

8. In finding that at the trial the defendant advanced the same specific objection to the said cluster hops, that is, that they were blighted, and in basing the judgment thereon (Tr. 53), if that finding is construed to mean that the defendant contended that the degree of mildew infestation was slight. Such finding is clearly erroneous and is unsupported by substantial evidence, as the evi-

dence is undisputed that the defendant contended at the trial that the plaintiff's hops were substantially damaged by mildew (Tr. 42, 119, 120, 180, 181, 268, 269, 277-280, 286-288, 301-307).

9. In finding that upon the facts the claimed defect that the cluster hops were blighted was not material, and in basing the judgment thereon (Tr. 53). Such finding is clearly erroneous and is unsupported by substantial evidence, as it is undisputed that if the agreement between the parties is construed in the manner advocated by the defendant, the failure of the plaintiff's hops to meet the standards of grade, quality and condition specified in the agreement, was substantial (Tr. 119, 120, 180, 181, 268, 269, 277-280, 286-288, 301-307).

10. In basing the judgment upon a finding that said cluster hops, when tendered to the defendant, were merchantable (Tr. 53), as hops which are simply merchantable, that is, salable at some price, do not necessarily meet the standards of grade, quality and condition specified in the agreement, if it is construed in the manner advocated by the defendant. This finding therefore has no relation whatever to the contract obligation of the plaintiff.

11. In finding that the plaintiff delivered the identical crop of cluster hops which the defendant contracted to buy, and in basing the judgment thereon (Tr. 54). Such finding is clearly erroneous and is unsupported by substantial evidence, as the contract covered future or unascertained goods deliverable only after processing (Tr. 10). Furthermore, the defendant agreed to accept

and pay for only hops meeting the standards of grade, quality and condition specified in the contract (Tr. 12).

12. In finding that the defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of cluster hops would be any different in condition or quality than said crop actually was when tendered and delivered, and in basing the judgment thereon (Tr. 54). Such finding is clearly erroneous and is unsupported by substantial evidence, as the contract plainly provides that the defendant was not obligated to accept and pay for any hops tendered to it which did not meet the standards of grade, quality and condition specified in such contract (Tr. 12). In the absence of evidence to the contrary, it must be conclusively presumed that the defendant did rely upon the warranty in the contract; there was no such evidence.

13. In finding that said cluster hops were of substantially the average quality of Oregon cluster hops accepted in 1947 by the hop trade generally and by the defendant under contracts containing the same type of quality provisions, and in basing the judgment thereon (Tr. 54). Such finding is clearly erroneous and is unsupported by substantial evidence, and does not form a proper basis for the judgment, as the contract cannot be construed to mean that average quality hops meet the standards of grade, quality and condition specified therein. Furthermore, such finding is wholly irrelevant and immaterial.

14. In finding that said cluster hops, upon tender and

delivery, substantially conformed to the quality provisions of the written agreement of August 19, 1947, and in basing the judgment thereon (Tr. 54). Such finding is clearly erroneous and is unsupported by substantial evidence, if the agreement is construed in the manner advocated by the defendant, as the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 119, 120, 180, 181, 268, 269, 277-280, 286-288, 301-307).

15. In finding that the defendant was in default in the payment of the purchase price of said cluster hops and that $8,846.52 was due and owing from the defendant on the first cause of action, as the undisputed evidence in this case establishes that, if this contract is construed in the manner advocated by the defendant, the plaintiff's cluster hops did not meet the standards specified in the contract and the defendant was not bound to accept them (Tr. 119, 120, 180, 181, 268, 269, 277-280, 286-288, 301-307).

16. In deciding that the plaintiff substantially performed all of the terms and conditions of the agreement between the parties with respect to the cluster hops, on his part to be performed (Tr. 55). Such finding is clearly erroneous and is unsupported by substantial evidence, if the agreement is construed in the manner adbocated by the defendant, as the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 119, 120, 180, 181, 268, 269, 277-280, 286-288, 301-307).

17. In deciding that the property in said cluster

hops passed to the defendant (Tr. 55), as this decision is contrary to law for three reasons: (1) The contract provides that title shall pass to the defendant only when the defendant tenders to the plaintiff the contract price of the quantity of hops accepted by the defendant. No such tender was ever made as the defendant rejected all of the plaintiff's hops. (2) As this was a sale for cash, title did not pass to the defendant as the defendant has never paid for the hops. (3) If this was not a sale for cash or cash on delivery, title did not pass as the hops did not meet the standards specified in the contract and the conditional assent of the defendant to the appropriation of the hops, implied from the delivery of the hops to the warehouse by agreement, was withdrawn by the rejection of such hops.

18. In deciding that the defendant became obligated to pay the plaintiff on or before October 31, 1947, on the first cause of action, the sum of $8,846.52, being the contract price of $11,846.52 less the advance payment of $3,000.00 (Tr. 55), as the undisputed evidence in this case establishes that, if this contract is construed in the manner advocated by the defendant, the plaintiff's hops did not meet the standards specified in the contract and the defendant was not bound to accept them (Tr. 119, 120, 180, 181, 268, 269, 277-280, 286-288, 301-307).

19. In deciding that the defendant wrongfully refused to and did not perform its obligation under said contract of August 19, 1947, covering said cluster hops (Tr. 55), as the undisputed evidence in this case establishes that, if this contract is construed in the manner

advocated by the defendant, the plaintiff's cluster hops did not meet the standards specified in the contract and the defendant was not bound to accept them (Tr. 119, 120, 180, 181, 268, 269, 277-280, 286-288, 301-307).

20. In deciding that the measure of the plaintiff's recovery on the first cause of action is, under the Oregon law, the difference between the amount claimed to be due under said cluster contract and the amount advanced to the plaintiff on that contract (Tr. 54, 55), as the contract provides that in the event of a breach by either party, the measure of damages is fixed and determined to be the difference between the contract price of said hops and the market value thereof at the time and place of delivery (Tr. 15). The plaintiff is bound by that provision.

21. In failing and refusing to apply the provision in said cluster contract of August 19, 1947 (Tr. 15), which fixed and determined the measure of damages as the difference between the contract price of the cluster hops and the market value thereof at the time and place of delivery (Tr. 54, 55), as the plaintiff is bound by that provision.

22. In deciding that the defendant should take nothing under its counterclaim against the first cause of action (Tr. 55), as the defendant is entitled to a judgment against the plaintiff on its counterclaim for $3,000.00, the amount of the loan and advance to the plaintiff, in the event of a reversal of the judgment, the said sum not having been repaid to the defendant (Tr. 54). This sum should be deducted from the amount admittedly

owing by the defendant to the plaintiff on the second cause of action (Tr. 54).

23. In failing and refusing to grant the motion to dismiss the first cause of action, filed on behalf of the defendant (Tr. 36, 39), and in failing and refusing to sustain the first defense in the defendant's answer (Tr. 40), as the contract provides that in the event of a breach by either party, the measure of damages is fixed and determined to be the difference between the contract price of said hops and the market value thereof at the time and place of delivery (Tr. 15). The plaintiff is bound by that provision.

ARGUMENT

Summary of Argument

I. The findings of fact with respect to the quality and condition of the hops tendered by the plaintiff to the defendant, are clearly erroneous and are unsupported by any substantial evidence.

II. The defendant was not bound to take delivery of the plaintiff's hops and was justified in rejecting them.

III. The court erred in concluding as a matter of law that the plaintiff substantially performed all of the terms and conditions of the agreement on his part to be performed, and that the defendant wrongfully refused to and did not perform its obligation under said contract.

IV. The plaintiff is not entitled to maintain this action for the price of the hops for the reason that the

facts of this case do not bring it within the operation of the provisions of the Uniform Sales Act which permit such an action.

V. The court erred in concluding as a matter of law that the property in the plaintiff's cluster hops passed to the defendant, and that the defendant became obligated to pay the plaintiff the amount due under said contract less the amount of the advance.

VI. The plaintiff is not entitled to maintain this action for the price of the hops for the reason that the contract itself precludes that measure of recovery.

VII. The court erred in failing and refusing to grant the defendant's motion to dismiss on the ground stated in paragraph 1 thereof (Tr. 36, 39), and in failing and refusing to sustain the first defense in the defendant's answer (Tr. 40).

VIII. The court erred in concluding as a matter of law that the measure of the plaintiff's recovery upon the facts here is, under Oregon law, the difference between the amount due under said contract and the amount of the advance.

IX. The defendant is entitled to a credit of $3,000, the amount of the cluster advance, on the judgment rendered on the second cause of action, in the event the judgment on the first cause of action is reversed.

I

THE FINDINGS OF FACT WITH RESPECT TO THE QUALITY AND CONDITION OF THE HOPS TENDERED BY THE PLAINTIFF TO THE DEFENDANT, ARE CLEARLY ERRONEOUS AND ARE UNSUPPORTED BY ANY SUBSTANTIAL EVIDENCE

The defendant contends that no substantial evidence was introduced tending to establish that the hops tendered by the plaintiff to the defendant met the standards of quality and condition specified in the contract of sale.

The contract contains a provision with respect to grade, quality and condition (Tr. 11), identical to that in the Geschwill contract, in these words:

> "Such hops shall not be the product of the first year's planting, and not affected by spraying or mold, but shall be of prime quality, in sound condition, good color, fully matured, cleanly picked, free from damage by vermin, properly dried, cured and baled, and in good order and condition."

The portions of the Findings of Fact claimed to be clearly erroneous and not supported by any substantial evidence, will be considered separately.

1. Paragraph 13 of Findings of Fact (Tr. 54):

> "Said hops were of substantially the average quality of such Oregon cluster hops actually accepted in 1947 by the hop trade generally and by defendant under contracts containing the same type of quality

provisions. Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said contract."

This is practically identical to the corresponding finding in the Geschwill case. Consequently the three minor headings in that brief, page 21, are retained.

1. Paraphrase of Paragraph 13 of Findings of Fact (Tr. 54):

(a) Hops which are of average quality and condition conform to the warranty contained in the contract.

The testimony concerning the meaning which must be given to the warranty in this contract, was introduced in the Geschwill case. A summary appears in the brief filed in that case, pages 21 and 22, which is incorporated herein by reference.

By reason of the stipulation and order under which these cases were tried, the court ruled that no similar evidence would be received in the Smith case (Tr. 178, 179) (Geschwill Tr. 503, 504). This plaintiff did testify, however, that prime hops are average hops of the year in which grown (Tr. 130), but he acknowledged that hops badly damaged by mildew cannot be of prime quality (Tr. 171).

The defendant contends that the cases and practical considerations which are discussed under heading I, subdivision 1(a), in the Geschwill brief, pages 23 to 27, establish that the term "prime quality" does not mean "average quality for the year in which grown," but that

it does mean that the hops shall not be the product of the first year's planting and they shall not be affected by spraying or mold, but shall be of good color, fully matured, cleanly picked, free from damage by vermin or disease, properly dried, cured and baled, and in good order and condition.

1. Paraphrase of Paragraph 13 of Findings of Fact (Tr. 54):

(b) The plaintiff's hops were of average quality and condition, and conformed to the warranty.

Witnesses called by the plaintiff testified that his hops were "average" or "a little better than the general average" in quality for the year 1947 (Tr. 182, 189). One of these was Mr. Cornoyer who had been a hop dealer for more than forty years (Tr. 177). He testified that the plaintiff's hops were not of prime quality because of the mildew (Tr. 181).

The plaintiff, when asked to compare his hops with the average grown in the Willamette Valley in 1947, simply said that they were better than average in lupulin content (Tr. 130).

An agricultural chemist, Mr. D. E. Bullis, was permitted to testify over the defendant's objection, concerning the results of chemical analyses of two samples of the plaintiff's cluster hops (Tr. 329-336). This testimony was clearly irrelevant by reason of the decision in *Netter v. Edmunson,* 71 Or. 604, 143 Pac. 636. Several exhibits were also introduced by which a comparison

can be made between the analyses of various samples of the 1947 hop crop, including the plaintiff's (Exhibits 25, 36, 37, Tr. 88, 91, 92, 331). This evidence has no probative value whatever because Mr. Bullis acknowledged that he did not know the extent of mildew damage in any of the 1947 samples analyzed by him. In other words, he did not know whether the other hops analyzed were of prime quality or were seriously damaged by mildew (Tr. 337).

In any event, Mr. Bullis admitted that, so far as preservative value is concerned, the maximum found in the 1947 samples was far below the average of 1940 samples analyzed by him. He explained this difference by stating that he thought the 1947 crop of hops as a whole was of poorer quality than the crop in 1940 (Tr. 340, 341).

All of this testimony was directed to the question whether the plaintiff's hops were of average quality for the year in which grown, in the Willamette Valley. None of it had any bearing on the real issue whether the plaintiff's hops were of "prime quality" as that term is defined in the warranty.

The testimony introduced by the defendant, on the other hand, establishes that this plaintiff's hops were heavily damaged by mildew, and that they were therefore not of prime quality, and were not of "good color," or "fully matured," as expressly required by the contract (Tr. 8, 277-280, 286-288, 301-307).

The analysis made by Mr. G. R. Hoerner, bacteriologist of the Oregon State College and U. S. Department

of Agriculture, specializing in a study of downey mildew in hops, is of great significance. The hop sample furnished to Mr. Hoerner was separated by him for this test in the same manner as that used by the Federal-State Inspection Service in making the determination of leaf and stem content which is accepted by both growers and buyers throughout the hop industry in this area as a factor in the determination of prices (Tr. 267, 268). Mr. Hoerner's test produced the following result: 83.58% by weight of this sample of the plaintiff's hops showed infected cones (Tr. 267-269). An examination of Exhibit 57E (Tr. 271) will demonstrate beyond any doubt that the infected portion of this sample was heavily and seriously damaged by mildew.

The sample thus analyzed by Mr. Hoerner was taken from one of the original 10th bale samples drawn from the bales when the hops were first sampled at the warehouse (Tr. 207, 208).

This test was strongly supported by the testimony of the witnesses produced by the defendant. Mr. Ray and Mr. Eismann examined all of the samples which were produced in court, 7 making up Exhibit 35, offered by the plaintiff, and 5 in Exhibit 52, offered by the defendant. Mr. Ray testified that the samples were not of prime quality because they were heavily damaged by mildew. He said there was no possibility of any hop expert grading them or any of them as prime quality. He added that they were not of good color because of mildew discoloration (Tr. 277-280). He described the mildew damage by saying that there was a very

general discoloration of the cones (Tr. 278). Mr. Eismann testified that the samples showed severe mildew damage and were not of prime quality. He said he did not see how there could be any doubt about this in the mind of any competent hop inspector or grader. He added that the hops were not of good color and that some of them were not fully matured (Tr. 285-288). Mr. Oppenheim, president of the defendant, testified that he regarded the plaintiff's hops as of poor quality and that he rejected them for that reason (Tr. 295, 301-308).

It will be evident in this case also that the plaintiff's witnesses directed their testimony to the question whether his hops were of average quality, and that the defendant's witnesses directed their testimony to the question whether such hops were of "prime quality" as that term is defined in the warranty itself.

It is equally evident that if the court construes this contract in the manner advocated by the defendant, it must be said that there is no substantial evidence tending to establish that the plaintiff's hops were of prime quality.

1. Paraphrase of Paragraph 13 of Findings of Fact (Tr. 54):

(c) The plaintiff's hops were substantially equal in quality to cluster hops actually accepted in 1947 by the hop trade generally and by the defendant under contracts containing the same type of quality provisions.

In the first place, it is well settled that evidence of collateral transactions is not relevant when offered to establish the terms of a contract between the parties or that it was breached by one of them, for the reason that the rights of the parties can not be affected or concluded by such collateral transactions.

Citations supporting that proposition are found in the Geschwill brief, page 31.

In the second place, there is no evidence in support of the finding now being considered, except such as is so indefinite as to be wholly meaningless.

2. Paragraph 12 of Findings of Fact (Tr. 53):

"Said * * * hops * * * tendered to the defendant * * * were merchantable."

It may be assumed that this finding of merchantability should be construed to mean that the plaintiff's hops were of average quality and condition, and that the defendant was therefore bound to take them, as there is an express finding to that effect in Paragraph 13 (Tr. 54). If so, it adds nothing to the latter.

If this finding of merchantability is construed to mean something else, there is only one clue in the findings to its proper construction.

All we know is that the court must have intended to find that the hops were not of "prime quality," if that expression is given the meaning advocated by the defendant.

That conclusion is supported by these facts which can be verified by referring to the Findings of Fact and Conclusions of Law on file in this cause:

Counsel for the plaintiff proposed this finding with respect to quality and condition:

> "Said 1947 crop hops produced by the plaintiff on said premises and tendered to the defendant under said contract were merchantable, were not affected by mold, were in sound condition and in good order, and were substantially fully matured, of good color, and of prime quality."

The court struck out the remainder of that sentence after the word "merchantable."

This finding is subject to such broad and varied interpretations that it has no materiality in this litigation. Furthermore, the word "merchantable" is not used in the warranty appearing in the contract nor is there any evidence ascribing to it any meaning by custom or usage, or otherwise.

The testimony shows that on some occasions when hops failed to meet the quality requirements of contracts, the buyers accepted them at reduced prices. In fact, the testimony indicates that in 1947 a considerable portion of the mildew-affected crop was sold at reduced prices. When hops failed to meet the quality provisions of contracts, it was simply a matter of negotiation of new "spot" sales at prices lower than provided in the contracts and based upon the lower quality of the hops (Geschwill Tr. 337, 338, 439, 445, 446). Consequently, when it is said that a particular lot of hops is "merchant-

able," that means simply that the hops are salable at some price, either the market price of prime quality hops, or some other price possibly substantially less than that figure.

The cases considered in the Geschwill brief, pages 33 and 34, establish that the finding of merchantability is wholly immaterial as it does not determine any issue in this case.

3. Paragraph 12 of Findings of Fact (Tr. 53):

> "By the term 'blighted' it was meant that the hops showed some mildew effect as stated above."

If, by the use of the word "some," counsel for the plaintiff who drafted these findings, intended to convey the impression that the defendant rejected these hops on the ground that they were infected with mildew in a minor degree, this finding is without any evidence whatever in its support. The testimony of several witnesses produced by the defendant establishes that the plaintiff's hops were heavily infected with mildew (Tr. 267-269, 277-280, 285-288). One of the witnesses who so testified was Mr. Oppenheim, president of the defendant. It was he who rejected these hops because of the serious nature of the blight (Tr. 295, 301-308), and the correspondence introduced in evidence so indicates (Exhibits 16, 17, 20, 21, 24, 27, 28, 29, 45, 48, Tr. 88-93).

4. Paragraph 12 of Findings of Fact (Tr. 53):

"Upon the facts neither claimed defect (that the

plaintiff's hops were blighted and 'dirty picked') was material."

While the materiality of the objection advanced by the defendant is probably a mixed question of law and fact, it is clear that, insofar as the finding is one of fact, it is unsupported by any substantial evidence.

The oral testimony produced by the defendant shows that the plaintiff's hops were seriously or heavily damaged by mildew. The test conducted by Mr. Hoerner of Oregon State College, shows that more than 80%, by weight, of the sample of the plaintiff's hops tested by him, consisted of diseased burrs, petals and nubbins (Tr. 267-269).

5. Paragraph 13 of Findings of Fact (Tr. 54):

"Defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of hops would be any different in condition or quality than said crop actually was when tendered and delivered as aforesaid."

There is no testimony whatever which remotely tends to support that finding. Both of these parties signed this contract containing the express warranty we have been considering, and it must be conclusively presumed that the defendant would not have entered into this contract if it had not expected and desired to receive prime quality hops, at least in the absence of substantial proof to the contrary. There was no such evidence.

4 Williston on Contracts, Section 972.

6. Paragraph 5 of Findings of Fact (Tr. 50):

> "Before entering into said cluster hop agreement defendant inspected said cluster hop crop and defendant knew that said hop crop then showed some mildew and would in normal course show such mildew when picked and baled."

The defendant acknowledges that the first clause of this finding is correct. Mr. Fry, an employee of the defendant's Oregon broker, walked through the cluster yard with the plaintiff, before the contract was signed, and saw that a great many of the hops were damaged by mildew (Tr. 105, 196). It was then that Mr. Fry and the plaintiff estimated that the harvest of good cluster hops would be only 10,000 pounds (50 bales), in spite of the fact that there were 20,000 pounds (100 bales) on the vines (Tr. 102, 103, 106, 138-141, 197, 198). The quantity stated in the contract was 10,000 pounds (Tr. 10).

The defendant contends that the remainder of this finding, "the defendant knew that said hop crop * * * would in normal course show such mildew when picked and baled," is clearly erroneous and is unsupported by any substantial evidence.

In the first place, this was not a normal year. Hops in the Willamette Valley suffered the worst late attack of downey mildew with resultant damage to the cones themselves, that could be recalled (Tr. 256) (Geschwill Tr. 426, 427).

Secondly, the defendant had no knowledge which

hops would be harvested and which would be left on the vines (Tr. 197, 198).

Furthermore, Mr. Fry and the plaintiff discussed selective picking of the hops. Mr. Fry testified it was understood that the plaintiff would not pick any mildewed hops (Tr. 198). This was not denied by the plaintiff. In fact, it is confirmed by his own testimony given on direct examination. He testified that possibly 50 per cent of the hops in his yard had been hit by mildew at some stage in their growth or development (Tr. 103, 151). He added that the other 50 per cent would not be picked, by which he must have meant that the half which was affected by mildew would not be picked (Tr. 103). The plaintiff also testified that he told Mr. Fry when they were in the yard on the occasion mentioned, that it was very difficult to judge the probable production exactly, but that they could make a conservative estimate of 50 bales (Tr. 106). This was exactly one half of the total number of hops estimated to be growing on the vines (Tr. 138).

If this finding is sustained, however, it is wholly irrelevant and immaterial and cannot form a proper basis for the judgment, as the plaintiff unconditionally assumed the burden and risk of harvesting, curing and baling hops of the grade, quality, and condition described in the contract.

The contract itself declares that the defendant should have the right to inspect the baled hops when tendered by the plaintiff, and reject those not of the grade, quality and condition described in the contract (Tr. 12).

A clearer statement of assumption of risk can hardly be imagined. The circumstances also strongly support this conclusion. It was the plaintiff's obligation and not the defendant's to pick the hops and to do so in such manner as to eliminate those which were blighted. Furthermore, it was understood that this would be done, during a discussion of selective picking before the contract was signed (Tr. 198).

The authorities establish that under these circumstances, the plaintiff assumed the risk that his crop when harvested, cured and baled, might fail to meet the warranty. They further establish that, as a consequence, a claim by the plaintiff that it was impossible to harvest the good hops without also picking an excessive quantity of blighted ones, is irrelevant and immaterial, if the court should sustain the finding that the defendant knew that said hop crop "would in normal course show such mildew when picked and baled."

Restatement of the Law of Contracts, Sec. 281, Illustration 1.

Restatement of the Law of Contracts, Sec. 456, Illustration 2.

3 Williston on Contracts, Sec. 838.

The controlling fact is that there has been a failure of consideration due to the failure of the plaintiff's hops when harvested, cured and baled, to meet the warranty. This conclusion is supported by the argument under heading II of this brief in which the discussion in the Geschwill brief, pages 41 to 45, is incorporated by reference.

That such failure of consideration would be a defense in spite of a finding that it was impossible to harvest the good hops without also picking an excessive quantity of blighted ones, is amply demonstrated by the discussion in 3 Williston on Contracts, Section 838. It is there said:

> "As the basis of the defendant's excuse where the plaintiff has failed to perform, or is obviously going to fail to perform, is failure of consideration, the reason why the plaintiff fails to perform is immaterial. Even though his failure is excusable impossibility, the result is the same. The defendant has not got what he bargained for and need not perform."

It is also declared in Section 838 that a claim of impossibility can be successfully advanced by the promisor in the event that the promisee knew of the impossibility at the time the contract was executed, only when the promisee assumed the risk of the failure of performance. This is also established by the Restatement of the Law of Contracts, Section 456, Illustration 2.

It must be concluded, therefore, that inasmuch as the plaintiff assumed the risk that his crop when harvested, cured and baled might fail to meet the warranty, it is entirely immaterial whether the defendant had knowledge when the contract was executed, that the plaintiff's crop would in normal course show some mildew when picked and baled.

7. Paragraph 3 of Findings of Fact (Tr. 49):

> "Pursuant to said contract, plaintiff cultivated and completed the cultivation of said premises and duly

harvested, cured and baled said hops grown thereon in said year in a careful and husbandlike manner."

8. Paragraph 8 of Findings of Fact (Tr. 51):

"Plaintiff did everything he was bound to do for the purpose of putting the specific crop of cluster hops in a deliverable state * * *."

9. Paragraph 8 of Findings of Fact (Tr. 51):

"Plaintiff duly performed all of the terms and conditions of the agreement between the parties on his part to be performed."

If what has been said in the argument under this heading I is correct and sound, the plaintiff did not do everything that he was bound to do under the contract, in that he failed to tender hops of prime quality. If he used the utmost care, he must still suffer the penalty of rejection as his hops did not comply with the warranty.

If the court construes the term "prime quality" to mean what the other expressions in the warranty specify, and to mean that the hops must be free of damage by mildew, it follows from what has been stated herein that the plaintiff has produced no evidence whatever that his hops met the standards of quality and condition expressed in the contract of sale.

The defendant respectfully contends that under these circumstances the findings discussed herein are clearly erroneous and should be set aside by reason of Rule 52 (a), Federal Rules of Civil Procedure, Title 28, U.S. C.A., following Section 723c, as it has been interpreted and applied in the cases relied upon in the Geschwill brief, page 40.

II

THE DEFENDANT WAS NOT BOUND TO TAKE DELIVERY OF THE PLAINTIFF'S HOPS AND WAS JUSTIFIED IN REJECTING THEM

Assuming that the conclusions stated in the argument under heading I are sound and that the hops tendered to the defendant did not meet the standards of grade, quality and condition specified in the contract of sale, the defendant was not bound to take delivery of such hops and was justified in rejecting them.

This is established by the decisions discussed in the Geschwill brief, pages 41 to 45. The argument therein is incorporated into this brief by reference.

III

THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE PLAINTIFF SUBSTANTIALLY PERFORMED ALL OF THE TERMS AND CONDITIONS OF THE AGREEMENT ON HIS PART TO BE PERFORMED, AND THAT THE DEFENDANT WRONGFULLY REFUSED TO AND DID NOT PERFORM ITS OBLIGATION UNDER SAID CONTRACT

This is established by the argument under headings I and II, which is incorporated herein by reference.

IV

THE PLAINTIFF IS NOT ENTITLED TO MAINTAIN THIS ACTION FOR THE PRICE OF THE HOPS FOR THE REASON THAT THE FACTS OF THIS CASE DO NOT BRING IT WITHIN THE OPERATION OF THE PROVISIONS OF THE UNIFORM SALES ACT WHICH PERMIT SUCH AN ACTION

An action for the price can be maintained only when authorized by Section 63 of the Uniform Sales Act, Section 71-163, O.C.L.A. That section provides:

> "(1) Where, under a contract to sell, or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.
>
> * * * * *
>
> "(3) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 71-164(4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price."

The cases which support this proposition are cited in the Geschwill brief, pages 46 and 47.

Section 63(3) of the Uniform Sales Act

Section 63(3) of the Act, Section 71-163(3), O.C. L.A., does not authorize a recovery of the price in this action for the reason that there is not the slightest evidence in this case that the plaintiff notified the defendant that the hops would thereafter be held by the plaintiff as bailee for the defendant.

Under these circumstances, the argument under this subdivision of heading IV of the Geschwill brief, pages 47 and 48, establishes that there can be no recovery of the price under Section 63(3) of the Act. That argument, therefore, is incorporated herein by reference.

Section 63(1) of the Uniform Sales Act

Section 63(1) of the Act, Section 71-163(1), O.C.L. A., does not authorize a recovery of the price in this action for the reason that the property in the cluster hops referred to in the plaintiff's complaint has not passed to the defendant within the meaning of that section.

This is established by the authorities relied upon in the argument under this subdivision of heading IV of the Geschwill brief, pages 48-61, and it is, accordingly, incorporated herein by reference.

The three detailed contentions stated therein, pages 48 and 49, are repeated in this brief, as a comment appears to be necessary with respect to each.

The court is referred particularly to the explanation of these three contentions appearing in the Geschwill brief, page 49.

1. The parties agreed in their contract that title should pass upon the happening of a certain event: the giving of a notice by the defendant tendering the price of the hops accepted. This was never done as all were rejected.

The governing clause of the contract, paragraph "Second" (Tr. 12), is exactly the same as the comparable provision in the Geschwill contract. It is quoted in the Geschwill brief, pages 51 and 52.

2. This transaction was a sale for cash, and title has never passed to the defendant for the reason that the defendant has never paid for these hops.

Here again, the clause which governs the transaction in the Smith case (Tr. 12), is exactly the same as the comparable one in the Geschwill case, quoted in the Geschwill brief, page 52.

3. If it can not be said that this was a sale for cash, a conditional title passed to the defendant upon the delivery of the hops to the warehouse. This title was defeated by the rejection of the hops due to their failure to meet the warranty.

One sentence in the Findings of Fact in the Geschwill case was challenged in that brief, pages 59 to 61.

A similar finding was made in the present case in paragraph 8 (Tr. 51), in these words:

"On or about September 15, 1947, after said cluster hops had been picked, dried, cured and baled as aforesaid, plaintiff, with the assent of defendant,

delivered at the Oregon Electric Company warehouse at Salem, Oregon, all of said cluster hops and set same aside for defendant."

For the reasons stated in the argument in the Geschwill brief, pages 59 to 61, this finding is clearly erroneous. Accordingly, the argument and authorities relied upon are incorporated herein by reference.

V

THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE PROPERTY IN THE PLAINTIFF'S CLUSTER HOPS PASSED TO THE DEFENDANT, AND THAT THE DEFENDANT BECAME OBLIGATED TO PAY THE AMOUNT DUE UNDER SAID CONTRACT LESS THE AMOUNT OF THE ADVANCE

This is established by the argument under heading IV, which is incorporated herein by reference.

VI

THE PLAINTIFF IS NOT ENTITLED TO MAINTAIN THIS ACTION FOR THE PRICE OF THE HOPS FOR THE REASON THAT THE CONTRACT ITSELF PRECLUDES THAT MEASURE OF RECOVERY

The provision concerning the measure of recovery in the contract we are considering in this case (Tr. 15),

is identical to that in the Geschwill case, quoted in the brief filed in that case, page 63. Accordingly, the argument under heading VI of that brief, and the authorities relied upon, pages 62 to 69, are incorporated herein by reference.

VII

THE COURT ERRED IN FAILING AND REFUSING TO GRANT THE DEFENDANT'S MOTION TO DISMISS ON THE GROUND STATED IN PARAGRAPH 1 THEREOF (TR. 36, 39), AND IN FAILING AND REFUSING TO SUSTAIN THE FIRST DEFENSE IN THE DEFENDANT'S ANSWER (TR. 40)

This is established by the argument under heading VI, which is incorporated herein by reference.

VIII

THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE MEASURE OF THE PLAINTIFF'S RECOVERY UPON THE FACTS HERE IS, UNDER OREGON LAW, THE DIFFERENCE BETWEEN THE AMOUNT DUE UNDER SAID CONTRACT AND THE AMOUNT OF THE ADVANCE

This is established by the argument under heading VI, which is incorporated herein by reference.

IX

THE DEFENDANT IS ENTITLED TO A CREDIT OF $3,000, THE AMOUNT OF THE CLUSTER ADVANCE, ON THE JUDGMENT RENDERED ON THE SECOND CAUSE OF ACTION, IN THE EVENT THE JUDGMENT ON THE FIRST CAUSE OF ACTION IS REVERSED

The contract clearly contemplates that if, for any justifiable reason, the defendant does not accept and pay for any of the plaintiff's cluster hops, the plaintiff is obligated to repay the amount of the advance, $3,000. The contract states (Tr. 13):

> ". . . . the buyer will advance and loan to the seller such sums of money as may be required by the seller to defray the necessary expenses of cultivating and picking such hops, and of harvesting and curing the same. . . . Said advances to be paid in the following manner: . . . $2,500.00 on or about September 1, 1947."

This cluster advance was made by the defendant to the extent of $3,000.00, and has not been repaid (Tr. 54).

Under these circumstances the defendant is entitled, in the event of a reversal of the judgment on the first cause of action, to a credit of $3,000.00 on the judgment rendered on the second cause of action. This is established by the cases cited in the Geschwill brief under heading IX, page 71, which are incorporated herein by reference.

CONCLUSION

It is desired that every reference herein to a portion of the Geschwill brief, shall be regarded as an adoption of that portion by such reference.

The defendant respectfully prays that the judgment on the first cause of action be reversed and that a credit of $3,000 be allowed the defendant on the judgment rendered on the second cause of action.

Respectfully submitted,

KERR & HILL,
ROBERT M. KERR,
STUART W. HILL,
Attorneys for Appellant.